

**TAB 89**

NO. GV3-03079

THE STATE OF TEXAS ) IN THE DISTRICT COURT  
 )  
ex rel. )  
 VEN-A-CARE OF THE )  
 FLORIDA KEYS, INC., )  
 Plaintiff(s), )  
 )  
 vs. ) TRAVIS COUNTY, TEXAS  
 )  
 ROXANE LABORATORIES, INC., )  
 BOEHRINGER INGELHEIM )  
 PHARMACEUTICALS, INC., BEN )  
 VENUE LABORATORIES, INC., )  
 and BOEHRINGER INGELHEIM )  
 CORPORATION, )  
 Defendant(s). ) 201ST JUDICIAL DISTRICT

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 ORAL AND VIDEOTAPED DEPOSITION OF

SHELDON BERKLE

JANUARY 27TH, 2005

VOLUME 1 OF

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 ORAL AND VIDEOTAPED DEPOSITION OF SHELDON BERKLE,

produced as a witness at the instance of the  
Plaintiff(s), and duly sworn, was taken in the  
above-styled and numbered cause on the 27th of January,  
2005, from 9:01 a.m. to 5:15 p.m., before CAROLYN J.  
FORD, Registered Professional Reporter and Notary  
Public, State of Florida at Large, reported by machine  
shorthand at the Doubletree Guest Suites, 12200 Tamiami  
Trail North, Naples, Florida, pursuant to the Texas  
Rules of Civil Procedure and the provisions attached  
previously.

<p>22</p> <p>1 have or not have.</p> <p>2 Q Let me see the organizational chart.</p> <p>3 MR. BREEN: What's our next exhibit number?</p> <p>4 MR. CRAWFORD: 139.</p> <p>5 MR. McCONNICO: It should be a lot more than</p> <p>6 that. It sure seems like we're past that.</p> <p>7 MR. CRAWFORD: We can skip 100 if you want to, I</p> <p>8 guess.</p> <p>9 MR. COVAL: This is the second case.</p> <p>10 MR. BREEN: 139, you said?</p> <p>11 MR. CRAWFORD: 139, I believe.</p> <p>12 (Exhibit No. 139, Organizational Chart, was</p> <p>13 marked for identification.)</p> <p>14 Q [By Mr. Breen] I'm going to hand you</p> <p>15 Exhibit 139.</p> <p>16 MR. COVAL: Is there a Bates on that?</p> <p>17 MR. BREEN: Yes, sir. It's ROX-01438</p> <p>18 MR. COVAL: Thank you.</p> <p>19 MR. BREEN: Sure.</p> <p>20 Q [By Mr. Breen] Have you ever seen this before?</p> <p>21 A I'm sure I probably have seen it. I mean, I</p> <p>22 don't recall specifically seeing this particular layout,</p> <p>23 but certainly I'm familiar with organization charts.</p> <p>24 Q You -- you see you're -- you're on there as</p> <p>25 executive VP --</p>	<p>24</p> <p>1 generic business. Is that what you're saying?</p> <p>2 A Correct.</p> <p>3 Q So who was minding the store when it came to the</p> <p>4 generic business from a sales and marketing perspective?</p> <p>5 A There was a chief executive of Roxane</p> <p>6 Laboratories.</p> <p>7 Q Who was that?</p> <p>8 A That was -- at that point it would have been</p> <p>9 Mr. Jerry Wojta. And for Ben Venue, which is also</p> <p>10 mentioned, that's what BV stands for, that was Mr. Tom</p> <p>11 Russillo.</p> <p>12 Q So who was responsible for making sure that the</p> <p>13 German executives in Ingelheim understood what they needed</p> <p>14 to understand regarding this business of reporting prices</p> <p>15 that were pertinent to state Medicaid reimbursement?</p> <p>16 A I think you're being too specific. I think the</p> <p>17 responsibility for information flow to the German parent</p> <p>18 company laid in the hands of the CEO which was Mr.</p> <p>19 Gerstenberg.</p> <p>20 Q Was Roxicodone a branded pharmaceutical?</p> <p>21 A No, it was not.</p> <p>22 Q Then why was it represented to be a branded</p> <p>23 pharmaceutical?</p> <p>24 A And I'm not clear on who would make that</p> <p>25 representation. I have no idea who would make that</p>
<p>23</p> <p>1 A Correct.</p> <p>2 Q -- BU Ethical Pharmaceuticals, S. Berkley?</p> <p>3 A Correct.</p> <p>4 Q That's you; right?</p> <p>5 A That's me.</p> <p>6 Q That would be the business unit?</p> <p>7 A Yes, that's correct.</p> <p>8 Q And the business unit was basically Boehringer</p> <p>9 Ingelheim, Roxane Laboratories -- Boehringer Ingelheim</p> <p>10 being BIPI, Boehringer Ingelheim Pharmaceuticals, Inc.,</p> <p>11 the U.S. company and later Ben Venue Laboratories all</p> <p>12 rolled into one?</p> <p>13 A The business unit concept which, by the way, was</p> <p>14 changed subsequently. You know, I'm not sure I would have</p> <p>15 100 percent agreement on this. As an example where it has</p> <p>16 under me BV and RLI multisource, T. Russillo --</p> <p>17 Q Yes, sir.</p> <p>18 A -- that really should have been a dotted line as</p> <p>19 opposed to a straight line.</p> <p>20 Q Why?</p> <p>21 A Because I didn't have exclusive responsibility</p> <p>22 for that end of the business. I had a strategic</p> <p>23 responsibility, but not an operational day-to-day</p> <p>24 responsibility.</p> <p>25 Q So if the -- well, this -- because that's the</p>	<p>25</p> <p>1 representation.</p> <p>2 Q So if they --</p> <p>3 A It may have been stated as a branded generic, but</p> <p>4 certainly in my life, in my pool, it would not be</p> <p>5 considered a branded pharmaceutical.</p> <p>6 Q How would it be reimbursed by the Medicaid</p> <p>7 programs, as a brand or a generic?</p> <p>8 A I have no idea because I wasn't involved with</p> <p>9 that business.</p> <p>10 Q Who had primary responsibility for the Boehringer</p> <p>11 U.S. operations advertising budget when you were the</p> <p>12 vice -- senior vice president for sales and marketing?</p> <p>13 A Are you referring to the branded business or the</p> <p>14 generic business?</p> <p>15 Q Were there two different budgets?</p> <p>16 A Absolutely.</p> <p>17 Q So when the budgets were reported to and approved</p> <p>18 by the German executives, you sent two budgets up, one for</p> <p>19 brands and one for generics?</p> <p>20 A Absolutely.</p> <p>21 Q Okay. So who's responsible for the advertising</p> <p>22 budget for generics?</p> <p>23 A Again, when I was still employed, the last person</p> <p>24 would have been Mr. Tom Russillo as the president of</p> <p>25 Roxane and Ben Venue Laboratories.</p>

26	28
<p>1 Q And who was responsible for the advertising 2 budget for brands?</p> <p>3 A Myself.</p> <p>4 Q Now, are you aware that the budget for 5 advertising and marketing for the Boehringer Ingelheim 6 U.S. operations was substantially greater than the budget 7 for research and development during the years that you 8 were the executive -- or the vice president for sales and 9 marketing?</p> <p>10 MR. McCONNICO: Objection; form.</p> <p>11 A I'm certainly -- you know, I'm not aware of that 12 at all and I'm not sure. Are you referring -- again, are 13 you referring to branded business? Are you referring to 14 generics business?</p> <p>15 Q [By Mr. Breen] Well, let's take the branded 16 business since you had control of that budget.</p> <p>17 A Right.</p> <p>18 Q What was bigger, the budget for advertising or 19 the budget for research and development?</p> <p>20 A Research and development.</p> <p>21 Q How about the generic side?</p> <p>22 A I have no idea.</p> <p>23 Q Did you ever supervise Judy Waterer?</p> <p>24 A No.</p> <p>25 Q She was not in your chain of command?</p>	<p>1 responsible for conveying orders.</p> <p>2 Q Why would you be involved in discussions about 3 Roxane's meter dose inhaler between the German parent 4 executives and people at Judy Waterer's level?</p> <p>5 A Again, it wouldn't have been with Judy Waterer's 6 level, at her level. It would have been with superiors to 7 her. So, again, I would be involved in discussions 8 because, again, we marketed Atrovent, the brand. And 9 Roxane was a sister company. And, therefore, there was 10 cross fertilization of general information about our 11 experiences with Atrovent.</p> <p>12 Q Who was Roseann Press?</p> <p>13 A Roseann Press was my administrative assistant.</p> <p>14 Q Was the Combivent meter dose inhaler a brand or a 15 generic?</p> <p>16 A A brand.</p> <p>17 Q Was the proposed Combivent unit dose product a 18 brand or a generic?</p> <p>19 A Again, if we're talking about Combivent as a unit 20 dose, a potential unit dose vial form of -- available form 21 to deliver the medication, then that in my mind is a 22 brand.</p> <p>23 Q So the Atrovent unit dose product --</p> <p>24 A Uh-huh.</p> <p>25 Q -- that was a brand; correct?</p>
27	29
<p>1 A Correct.</p> <p>2 Q How about Christine Ferrara?</p> <p>3 A Again, she reported into someone who reported to 4 me.</p> <p>5 Q Did Judy Waterer report to somebody that reported 6 to you?</p> <p>7 A Again, for a period of time when I had a dotted 8 relationship with Roxane, in other words, through about 9 1999. After that, not.</p> <p>10 Q Did you ever have responsibility for Roxane's 11 ipratropium bromide meter dose inhaler?</p> <p>12 A No.</p> <p>13 Q Don't know anything about it?</p> <p>14 A I did not say I didn't know anything about it. I'm most certainly aware that they launched a generic version of a brand Atrovent that I was responsible for in the United States.</p> <p>18 Q You were responsible for the brand Atrovent; correct? God bless you.</p> <p>20 A Right.</p> <p>21 Q God bless you. So you never conveyed any orders or directions from the German executives to Judy Waterer or anybody else regarding the Roxane meter dose inhaler?</p> <p>24 A I did not convey orders. I may have been involved in discussions, but never being -- I was not</p>	<p>1 A Correct.</p> <p>2 Q And you were responsible for it?</p> <p>3 A Yes.</p> <p>4 Q Including any arrangements to deeply discount it to hook big clients?</p> <p>6 A I'm -- I'm not aware of anything referring to that.</p> <p>8 Q You don't know Rick Powell, do you?</p> <p>9 A I'm sorry?</p> <p>10 Q You don't know Rick Powell, do you?</p> <p>11 A I never heard of him.</p> <p>12 Q Never heard of him?</p> <p>13 A No.</p> <p>14 Q Ever heard of RDI, a respiratory -- a respiratory company RDI?</p> <p>16 A Again, I'm aware of the name, but I don't know any details.</p> <p>18 Q Ever heard of Accurate Pharmacy?</p> <p>19 A No.</p> <p>20 Q Well, who -- who approved the prices that the branded products that you were responsible for in the sales and marketing business could be sold at?</p> <p>23 A Again, they would have to have the approval of the CEO, Mr. Gerstenberg, and with the parent company.</p> <p>24 Q For the branded products?</p>

<p style="text-align: right;">38</p> <p>1     <b>A</b> Yes, I do.</p> <p>2     Q Why are you telling the generic side or conveying 3 information that the German executives say you're going to 4 have to do about a generic product? Why are you involved 5 in conveying that information?</p> <p>6     <b>A</b> Again, this happens to be a generic product of a 7 Boehringer branded product. And as a result there are 8 obvious implications for the branded product once -- 9 excuse me, the generic is launched. And it was natural 10 for the sister companies to have -- share information and 11 convey -- the branded company to convey their experience 12 of the marketplace to their sister company.</p> <p>13     Having responsibility for the strategic 14 responsibility for the business unit which was in 15 existence at that time, then I would facilitate discussion 16 between the two units. But anything beyond that in terms 17 of the specific details of the generic launch were 18 established by the Roxane organization.</p> <p>19     Q Number four (as read): Review of Persantin, 20 slash, ASA press.</p> <p>21     <b>A</b> Right. That -- that refers to a branded product 22 Aggrenox which was being scheduled for launch within the 23 planning period.</p> <p>24     Q What do the German executives at Ingelheim, 25 Germany have to do with the price of that particular drug</p>	<p style="text-align: right;">40</p> <p>1     <b>A</b> that would never occur.</p> <p>2     Q Wouldn't occur?</p> <p>3     <b>A</b> Absolutely not.</p> <p>4     Q Would you allow it to occur?</p> <p>5     <b>A</b> Absolutely not.</p> <p>6     Q Okay. Now, moving down to review of Duraclon --</p> <p>7     <b>A</b> Yes.</p> <p>8     Q -- in the Roxane forecast. What's Duraclon?</p> <p>9     <b>A</b> Duraclon was a branded product. It was an 10 injectable quantity. And at that point in time Roxane 11 marketed predominantly multisource products, generic 12 products, but they also had some branded products in their 13 line. At a later date when we reorganized, any branded 14 products were taken out -- taken out of the Roxane line.</p> <p>15     Q But at this particular point in time in 1996, if 16 Roxane was working with a branded product, then you would 17 have some operational responsibility for marketing with 18 respect to that product?</p> <p>19     <b>A</b> Correct.</p> <p>20     Q Okay. And then review of the tam --</p> <p>21     <b>A</b> Tamsulosin.</p> <p>22     Q -- tamsulosin price.</p> <p>23     <b>A</b> Correct. Tamsulosin is marketed under the 24 trademark Flomax.</p> <p>25     Q That's a brand?</p>
<p style="text-align: right;">39</p> <p>1     in the United States?</p> <p>2     <b>A</b> Again, the parent company had to agree to the 3 establishment of price -- launch prices for any branded 4 product.</p> <p>5     Q All right. Do they have to agree to any price 6 reductions for a branded product?</p> <p>7     <b>A</b> In most cases we would inform them certainly from 8 an informational point of view. Sometimes they got 9 involved, sometimes they didn't get involved. And, again, 10 in my experience in my tenure in the United States, I'm 11 not aware of reducing prices within the branded 12 marketplace.</p> <p>13     Q If prices had been reduced in the branded 14 marketplace, would it have been your responsibility to 15 take action to modify reports of those prices that were 16 used for government reimbursement programs?</p> <p>17     <b>A</b> Again, people in my organization would have made 18 recommendations which I would approve if that was to 19 occur.</p> <p>20     Q Would you have ever allowed a situation to occur 21 in the branded side where the price of a brand was 22 reduced, but you didn't tell the entities reporting those 23 prices to the government so that you could keep the 24 reimbursement up even though the price went down?</p> <p>25     <b>A</b> Well, I can say that if that was ever to happen</p>	<p style="text-align: right;">41</p> <p>1     <b>A</b> Branded product.</p> <p>2     Q This was your personal request. And then, seven 3 (as read): Inclusion of up to date Mirapex forecast?</p> <p>4     <b>A</b> Mirapex is a branded product used in the 5 treatment of Parkinson's disease.</p> <p>6     Q And then (as read): Tentative revision of 7 Combivent introduction. I'll have to feed this into you.</p> <p>8     <b>A</b> Again, Combivent is a branded product and we were 9 looking towards trying to develop data sufficient for 10 regulatory approval.</p> <p>11     Q And then it goes on to number nine (as read): 12 Review and confirmation of all product pricing long term.</p> <p>13     Ed, please review this for Roxane. I would like to see 14 all the recommended pricing for BIPI.</p> <p>15     <b>A</b> Right. So, in other words, I'm conveying the 16 message that I received from parent company, but I'm 17 saying Ron -- Ed, the Roxane multisource products, that's 18 your responsibility. Anything to do with the branded 19 products, you know, or relative to BIPI I would look at. 20 But it doesn't indicate that I would be looking at the 21 generic prices.</p> <p>22     Q Well, Ed Tupa is the Ed here; right?</p> <p>23     <b>A</b> Correct.</p> <p>24     Q So when you say to Ed, Look at this for Roxane, 25 you knew that Roxane also manufactured some brands; right?</p>

<p>42</p> <p>1     <b>A Yes.</b></p> <p>2     Q And then you said, I'll look at it for the</p> <p>3     recommended pricing for BIPI. You were talking about</p> <p>4     Boehringer Ingelheim Pharmaceutical, Inc., which primarily</p> <p>5     manufactures branded products?</p> <p>6     <b>A Yes.</b></p> <p>7     Q Who was going to look at Roxane's branded</p> <p>8     products?</p> <p>9     <b>A Again, that would be the senior executive within</b>  <b>10 the Roxane organization. And at that time it would have</b>  <b>11 been Jerry Wojta and then ultimately Werner Gerstenberg as</b>  <b>12 CEO and head of BIC.</b></p> <p>13     Q So in November of 1996, the German executives</p> <p>14     were looking, reviewing all product pricing for both the</p> <p>15     brand side and the generic side of the Boehringer U.S.</p> <p>16     operations?</p> <p>17     <b>A Again, I can only talk for the branded.</b></p> <p>18     <b>Certainly for the branded side, I don't know the details</b>  <b>19 that they would have got involved in with the generics.</b></p> <p>20     Q Well, why would you have put out this information</p> <p>21     saying that one of their points, number nine, that you're</p> <p>22     giving everybody a heads up on is they want to review and</p> <p>23     confirm all product pricing long-term. And you're telling</p> <p>24     Ed to review this for Roxane. Doesn't -- doesn't that</p> <p>25     tell you that they want to look at the generic prices as</p>	<p>44</p> <p>1     <b>A Uh-huh.</b></p> <p>2     Q Did you ordinarily send memos around saying "I</p> <p>3     want to see it Monday at the latest and this is a top</p> <p>4     priority" in all caps. Was that common?</p> <p>5     <b>A I would not say it's common. I think it probably</b>  <b>6 relayed the message I received from the parent companies</b>  <b>7 saying they have some timeline that they want to look at</b>  <b>8 -- look at everything.</b></p> <p>9     Q Is it -- then you were trying to convey some</p> <p>10     sense of urgency?</p> <p>11     MR. McCONNICO: Objection; form.</p> <p>12     <b>A Again, you know, I only see what you see and it</b>  <b>13 would appear that there was some timeline urgency here.</b></p> <p>14     Q [By Mr. Breen] Now, if we go back to the first</p> <p>15     page and we -- we move up the e-mail chain here to</p> <p>16     November 25, 1996, at 1:13 p.m. Do you see this memo from</p> <p>17     Herman -- from Herman Dick?</p> <p>18     <b>A Uh-huh.</b></p> <p>19     Q He works with Roxane; right?</p> <p>20     <b>A I -- I assume on the signature on the top that he</b>  <b>21 did. I don't even recall him to be honest with you.</b></p> <p>22     Q And you see that it's a memo to Ed -- or e-mail</p> <p>23     to Ed saying (as read): Judy Waterer and I changed the</p> <p>24     budgeted units for ipratropium MDI to reflect a October</p> <p>25     1st, 1997 launch.</p>
<p>43</p> <p>1     well as the brand prices?</p> <p>2     <b>A Again, I can't interpret, you know, what the</b>  <b>3 parent company wanted. I would have been conveying a</b>  <b>4 message.</b></p> <p>5     Q Well, Ed Tupa, can you please tell us what -- he</p> <p>6     was the guy responsible for the generic side; right?</p> <p>7     <b>A Yes.</b></p> <p>8     Q So why would you be bringing Ed into this picture</p> <p>9     giving him a specific job telling him in connection with a</p> <p>10     review and confirmation of all -- of all product pricing</p> <p>11     long-term if you didn't think the Germans wanted to look</p> <p>12     at generic pricing?</p> <p>13     <b>A Again, I don't know what they wanted to look at</b>  <b>14 or not look -- wanted or did not want to look at. Ed</b>  <b>15 would have discussed this with Mr. Wojta and they would</b>  <b>16 have had whatever appropriate discussions with the parent</b>  <b>17 company.</b></p> <p>18     Q Then you go on. You say (as read): The timeline</p> <p>19     for development of these numbers will be very short and I</p> <p>20     would recommend that you start looking at this</p> <p>21     immediately.</p> <p>22     <b>A Right.</b></p> <p>23     Q (As read): I will confirm the required dates by</p> <p>24     Monday, the latest. This is a top priority. And you put</p> <p>25     that in all caps.</p>	<p>45</p> <p>1     <b>A Uh-huh.</b></p> <p>2     Q And then they go on --</p> <p>3     MR. McCONNICO: Shelly, try to say yes or no when</p> <p>4     you respond because --</p> <p>5     <b>A Yes.</b></p> <p>6     MR. McCONNICO: -- it's difficult for the</p> <p>7     reporter.</p> <p>8     <b>A Yes.</b></p> <p>9     Q [By Mr. Breen] Then they go on to provide the</p> <p>10     information that you told them they were going to have to</p> <p>11     provide for the ipratropium MDI?</p> <p>12     <b>A Again, I don't think I told them specifically</b>  <b>13 what to do. This, again, is an informational e-mail.</b></p> <p>14     Q So when you were saying I will -- all right. And</p> <p>15     you're -- you're copied on here; do you see that?</p> <p>16     <b>A Yes, I do.</b></p> <p>17     Q Why would they have copied you if you had</p> <p>18     absolutely nothing to do with ipratropium bromide MDI?</p> <p>19     <b>A Again, there was a dotted-line responsibility</b>  <b>20 that I had strategically for the organization. I believe</b>  <b>21 I also previously mentioned to you for ipratropium, this</b>  <b>22 was a unique case in that it was a generic version of a</b>  <b>23 brand Atrovent that was marketed by BI Pharmaceuticals.</b>  <b>24 And, therefore, there was an information exchange between</b>  <b>25 the two organizations.</b></p>
<p>42</p> <p>1     <b>A Yes.</b></p> <p>2     Q And then you said, I'll look at it for the</p> <p>3     recommended pricing for BIPI. You were talking about</p> <p>4     Boehringer Ingelheim Pharmaceutical, Inc., which primarily</p> <p>5     manufactures branded products?</p> <p>6     <b>A Yes.</b></p> <p>7     Q Who was going to look at Roxane's branded</p> <p>8     products?</p> <p>9     <b>A Again, that would be the senior executive within</b>  <b>10 the Roxane organization. And at that time it would have</b>  <b>11 been Jerry Wojta and then ultimately Werner Gerstenberg as</b>  <b>12 CEO and head of BIC.</b></p> <p>13     Q So in November of 1996, the German executives</p> <p>14     were looking, reviewing all product pricing for both the</p> <p>15     brand side and the generic side of the Boehringer U.S.</p> <p>16     operations?</p> <p>17     <b>A Again, I can only talk for the branded.</b></p> <p>18     <b>Certainly for the branded side, I don't know the details</b>  <b>19 that they would have got involved in with the generics.</b></p> <p>20     Q Well, why would you have put out this information</p> <p>21     saying that one of their points, number nine, that you're</p> <p>22     giving everybody a heads up on is they want to review and</p> <p>23     confirm all product pricing long-term. And you're telling</p> <p>24     Ed to review this for Roxane. Doesn't -- doesn't that</p> <p>25     tell you that they want to look at the generic prices as</p>	<p>44</p> <p>1     <b>A Uh-huh.</b></p> <p>2     Q Did you ordinarily send memos around saying "I</p> <p>3     want to see it Monday at the latest and this is a top</p> <p>4     priority" in all caps. Was that common?</p> <p>5     <b>A I would not say it's common. I think it probably</b>  <b>6 relayed the message I received from the parent companies</b>  <b>7 saying they have some timeline that they want to look at</b>  <b>8 -- look at everything.</b></p> <p>9     Q Is it -- then you were trying to convey some</p> <p>10     sense of urgency?</p> <p>11     MR. McCONNICO: Objection; form.</p> <p>12     <b>A Again, you know, I only see what you see and it</b>  <b>13 would appear that there was some timeline urgency here.</b></p> <p>14     Q [By Mr. Breen] Now, if we go back to the first</p> <p>15     page and we -- we move up the e-mail chain here to</p> <p>16     November 25, 1996, at 1:13 p.m. Do you see this memo from</p> <p>17     Herman -- from Herman Dick?</p> <p>18     <b>A Uh-huh.</b></p> <p>19     Q He works with Roxane; right?</p> <p>20     <b>A I -- I assume on the signature on the top that he</b>  <b>21 did. I don't even recall him to be honest with you.</b></p> <p>22     Q And you see that it's a memo to Ed -- or e-mail</p> <p>23     to Ed saying (as read): Judy Waterer and I changed the</p> <p>24     budgeted units for ipratropium MDI to reflect a October</p> <p>25     1st, 1997 launch.</p>
<p>43</p> <p>1     well as the brand prices?</p> <p>2     <b>A Again, I can't interpret, you know, what the</b>  <b>3 parent company wanted. I would have been conveying a</b>  <b>4 message.</b></p> <p>5     Q Well, Ed Tupa, can you please tell us what -- he</p> <p>6     was the guy responsible for the generic side; right?</p> <p>7     <b>A Yes.</b></p> <p>8     Q So why would you be bringing Ed into this picture</p> <p>9     giving him a specific job telling him in connection with a</p> <p>10     review and confirmation of all -- of all product pricing</p> <p>11     long-term if you didn't think the Germans wanted to look</p> <p>12     at generic pricing?</p> <p>13     <b>A Again, I don't know what they wanted to look at</b>  <b>14 or not look -- wanted or did not want to look at. Ed</b>  <b>15 would have discussed this with Mr. Wojta and they would</b>  <b>16 have had whatever appropriate discussions with the parent</b>  <b>17 company.</b></p> <p>18     Q Then you go on. You say (as read): The timeline</p> <p>19     for development of these numbers will be very short and I</p> <p>20     would recommend that you start looking at this</p> <p>21     immediately.</p> <p>22     <b>A Right.</b></p> <p>23     Q (As read): I will confirm the required dates by</p> <p>24     Monday, the latest. This is a top priority. And you put</p> <p>25     that in all caps.</p>	<p>45</p> <p>1     <b>A Uh-huh.</b></p> <p>2     Q And then they go on --</p> <p>3     MR. McCONNICO: Shelly, try to say yes or no when</p> <p>4     you respond because --</p> <p>5     <b>A Yes.</b></p> <p>6     MR. McCONNICO: -- it's difficult for the</p> <p>7     reporter.</p> <p>8     <b>A Yes.</b></p> <p>9     Q [By Mr. Breen] Then they go on to provide the</p> <p>10     information that you told them they were going to have to</p> <p>11     provide for the ipratropium MDI?</p> <p>12     <b>A Again, I don't think I told them specifically</b>  <b>13 what to do. This, again, is an informational e-mail.</b></p> <p>14     Q So when you were saying I will -- all right. And</p> <p>15     you're -- you're copied on here; do you see that?</p> <p>16     <b>A Yes, I do.</b></p> <p>17     Q Why would they have copied you if you had</p> <p>18     absolutely nothing to do with ipratropium bromide MDI?</p> <p>19     <b>A Again, there was a dotted-line responsibility</b>  <b>20 that I had strategically for the organization. I believe</b>  <b>21 I also previously mentioned to you for ipratropium, this</b>  <b>22 was a unique case in that it was a generic version of a</b>  <b>23 brand Atrovent that was marketed by BI Pharmaceuticals.</b>  <b>24 And, therefore, there was an information exchange between</b>  <b>25 the two organizations.</b></p>

13 (Pages 46 to 49)

<p style="text-align: right;">46</p> <p>1 Q Who was David Townley?</p> <p>2 A David Townley is employed by Boehringer Ingelheim</p> <p>3 and has had various roles serving during my time within</p> <p>4 Boehringer on an international level.</p> <p>5 Q Where does he work for them?</p> <p>6 A Today?</p> <p>7 Q Yes.</p> <p>8 A I have no idea.</p> <p>9 Q Where did he work for them in February of 1996?</p> <p>10 A I'm not sure. He may have been in Ingelheim at</p> <p>11 that point in time.</p> <p>12 Q Was he ever assigned to the U.S. corporation</p> <p>13 living in the United States?</p> <p>14 A No, he was not.</p> <p>15 Q So all of your dealings with him had -- occurred</p> <p>16 when he was actually living in Ingelheim, Germany working</p> <p>17 at the parent?</p> <p>18 A Correct.</p> <p>19 Q How about Warren Lackstrom?</p> <p>20 A Warren Lackstrom worked within the Boehringer</p> <p>21 Pharmaceuticals organization.</p> <p>22 Q In the United States?</p> <p>23 A In the United States.</p> <p>24 MR. BREEN: Okay. We're about to run out of tape</p> <p>25 here so maybe this is a good time to take a break.</p>	<p style="text-align: right;">48</p> <p>1 A Yes.</p> <p>2 Q You received that from Mr. Lackstrom? Okay.</p> <p>3 A Correct.</p> <p>4 Q Do you have a recollection of having received</p> <p>5 this --</p> <p>6 A No.</p> <p>7 Q -- from Mr. Lackstrom?</p> <p>8 A No, I don't.</p> <p>9 Q All right. Now, the subject is the respiratory,</p> <p>10 slash, UDV strategy. Would UDV be unit dose vial?</p> <p>11 A Correct.</p> <p>12 Q And in February of 1996, what kind of respiratory</p> <p>13 unit dose vial pharmaceutical products did the Boehringer</p> <p>14 U.S. operation have available to sell?</p> <p>15 A At that point I believe it was Atrovent.</p> <p>16 Q And Atrovent is known by the generic name of</p> <p>17 ipratropium bromide; correct?</p> <p>18 A Yes.</p> <p>19 Q All right. Any others?</p> <p>20 A Not that I can recall.</p> <p>21 Q So you're --</p> <p>22 A Not -- not within the -- certainly the branded</p> <p>23 business.</p> <p>24 Q All right. Were you aware of any other</p> <p>25 respiratory unit dose vial pharmaceutical that was</p>
<p style="text-align: right;">47</p> <p>1 THE WITNESS: Sure.</p> <p>2 MR. BREEN: If that's okay.</p> <p>3 THE WITNESS: Sure.</p> <p>4 MR. BREEN: We can change the tape.</p> <p>5 THE WITNESS: Thank you.</p> <p>6 THE VIDEOGRAPHER: This concludes Videotape No. 1</p> <p>7 of Sheldon Berkle. We are going off the record. The</p> <p>8 time is 9:56 a.m.</p> <p>9 (Short recess was taken.)</p> <p>10 THE VIDEOGRAPHER: For identification purposes</p> <p>11 this is Videotape No. 2 of Sheldon Berkle. We're back</p> <p>12 on the record. The time is 10:14 a.m.</p> <p>13 (Exhibit No. 141, Inter-Office Memorandum dated</p> <p>14 2/29/96, was marked for identification.)</p> <p>15 Q [By Mr. Breen] Okay. Mr. Berkle, I've now</p> <p>16 marked as Exhibit 141 or had the court reporter mark what</p> <p>17 purports to be a inter-office memo from you to Warren</p> <p>18 Lackstrom dated February 29, 1996. It's Bates stamped</p> <p>19 ROX-04295, 296, 297 and 298. I've handed a copy to your</p> <p>20 counsel. I'll ask you to take a moment to look at that.</p> <p>21 A Okay.</p> <p>22 Q Now, on February 29th, 1996 -- well, first off,</p> <p>23 did you send this memo to Mr. Lackstrom?</p> <p>24 A No, I received that from Mr. --</p> <p>25 Q I'm sorry.</p>	<p style="text-align: right;">49</p> <p>1 manufactured or otherwise distributed by the Boehringer</p> <p>2 U.S. operations in February of 1996 other than ipratropium</p> <p>3 bromide?</p> <p>4 A I -- I can't recall specifically whether Roxane</p> <p>5 had any other generic UDV's, so I'm not sure.</p> <p>6 Q All right. So if this was being directed to you,</p> <p>7 though, it was -- must have been talking about ipratropium</p> <p>8 bromide; correct?</p> <p>9 A Not true.</p> <p>10 Q No?</p> <p>11 A No.</p> <p>12 Q What other types of unit dose vial respiratory</p> <p>13 pharmaceuticals were you involved with in February of 1996</p> <p>14 besides ipratropium bromide?</p> <p>15 A What this memo refers to is a international</p> <p>16 strategy that the parent company wished to explore. In</p> <p>17 other words, finding other potential products --</p> <p>18 respiratory products that they could produce and market</p> <p>19 and sell within a UDV delivery system.</p> <p>20 Q Would that include generics?</p> <p>21 A It may but not necessarily. We were looking</p> <p>22 predominantly for products we could market under a branded</p> <p>23 trademark on a global basis.</p> <p>24 Q Now, are you aware that Roxane launched a generic</p> <p>25 ipratropium bromide sometime around the time of this</p>

<p style="text-align: right;">70</p> <p>1 Roxane's generic ipratropium bromide as being of the same 2 quality as Boehringer's brand Atrovent?</p> <p>3     <b>A Again, I'm not aware of the details that would</b> 4     <b>have been used in the marketing statements by Roxane.</b></p> <p>5         MR. BREEN: Let's have this one marked as the 6         next exhibit. I'll give you yours first, Steve.</p> <p>7         MR. McCONNICO: Thanks. I appreciate, Jim.</p> <p>8         MR. COVAL: 150?</p> <p>9         THE COURT REPORTER: Yes. 10         (Exhibit No. 150, E-mail dated 10/20/97, was 11         marked for identification.)</p> <p>12         Q [By Mr. Breen] This is Bates labeled ROX 5980. 13         It purports to be an e-mail from Edward Tupa dated Monday, 14         October 20th, 1997, to Dr. Kirk Shepard, to Jim King, to 15         various other individuals one of whom is Mr. Shelly 16         Berkle. Now, Dr. Kirk Shepard, where did he work?</p> <p>17         <b>A He -- he worked in Connecticut.</b></p> <p>18         Q The same thing --</p> <p>19         <b>A -- the Connecticut office.</b></p> <p>20         Q The same with Dr. Wolfgang Baiker?</p> <p>21         <b>A Yes.</b></p> <p>22         Q Were they U.S. nationals or were they over here 23         from the German parent?</p> <p>24         <b>A Dr. Baiker was from the German parent working</b> 25         <b>within the U.S. organization. Dr. -- Dr. Shepard is a</b></p>	<p style="text-align: right;">72</p> <p>1 correct?</p> <p>2         <b>A Again, not in the details. Dr. Shepard sat on</b> 3         <b>that committee. And, again, I don't recall this memo at</b> 4         <b>all and it doesn't necessarily mean that this subject</b> 5         <b>would have been discussed at the operating committee.</b></p> <p>6         Q All right. Well, let's read the memo. It says 7         (as read): As a miscellaneous item, I need to bring up a 8         topic at BUOC regarding our difficulty maintaining the 9         ipratropium bromide UDV business. We have known that Dey 10         came in with the advantage of a bundle of three products, 11         ipratropium, albuterol and cromolyn, as well as a more 12         user-friendly package and these advantages would be 13         difficult for us to compete with. We assumed that the 14         home care market would be their greatest opportunity. 15         That turned out to be true at the beginning. We did not 16         expect they would be able to carry the same clout over the 17         hospital and retail side. That no longer appears to be a 18         valid assumption. Our market share in these later markets 19         is falling significantly.</p> <p>20         Is that something that you were -- had any 21         interest in as the executive vice president for sales and 22         marketing of the business unit?</p> <p>23         <b>A Again, in the case of ipratropium which was a</b> 24         <b>unique case because the branded product was marketed by</b> 25         <b>Boehringer Ingelheim Pharmaceuticals. There was a sharing</b></p>
<p style="text-align: right;">71</p> <p>1     <b>national.</b></p> <p>2         Q And you see that one of the addressees is a 3         Mr. Feldman, Richard Feldman?</p> <p>4         <b>A Correct.</b></p> <p>5         Q A copy went to your administrative assistant, 6         Roseann Press?</p> <p>7         <b>A Uh-huh, yes.</b></p> <p>8         Q A copy went to Judy Waterer of Roxane?</p> <p>9         <b>A Yes.</b></p> <p>10         Q And the subject is BUOC. Do you know what BUOC 11         is?</p> <p>12         <b>A Business unit operating committee.</b></p> <p>13         Q Now, this business unit operating committee was a 14         committee involved in operations; right?</p> <p>15         <b>A Yes. But, again, more on a strategic level as</b> 16         <b>opposed to a detailed level.</b></p> <p>17         Q And this is when you were the executive vice 18         president for sales and marketing for the business unit; 19         correct?</p> <p>20         <b>A Yes.</b></p> <p>21         Q So -- but that's -- but you didn't have any 22         operational responsibility for multisource?</p> <p>23         <b>A Correct.</b></p> <p>24         Q Even though -- and multisource then was never 25         part of the business unit operating committee's agenda;</p>	<p style="text-align: right;">73</p> <p>1     <b>of information to make sure everybody on both sides -- in</b> 2     <b>other words, both with Roxane and Boehringer, knew it was</b> 3     <b>occurring in the marketplace. But anything to do with the</b> 4     <b>establishment of pricing was decided within the Roxane</b> 5     <b>organization, had to be approved by the CEO of the Roxane</b> 6     <b>-- or the president of the Roxane organization. And,</b> 7     <b>again, opinions would perhaps be offered between the two</b> 8     <b>sister companies, but wouldn't necessarily dictate what</b> 9     <b>occurred within the Roxane organization.</b></p> <p>10         Q Well, okay. So Mr. Tupa is talking about the 11         significant declining of the market share for the 12         ipratropium UDV business; do you see that?</p> <p>13         <b>A Yes, I do.</b></p> <p>14         Q Is that the brand Atrovent business or is that 15         the multisource ipratropium business or is it both?</p> <p>16         <b>A I would -- I would assume it refers to the Roxane</b> 17         <b>business because he had responsibility for the multisource</b> 18         <b>and not for the branded.</b></p> <p>19         Q It goes on to say (as read): We now need to 20         bring greater strength to our offering by utilizing the 21         power of the BIP and Roxane respiratory products.</p> <p>22         Do you see that?</p> <p>23         <b>A Yes, I do.</b></p> <p>24         Q Now, what respiratory products -- what 25         multisource respiratory products did BIP offer?</p>

<p style="text-align: right;">74</p> <p>1     <b>A   None.</b></p> <p>2     Q   So is he talking about multisource there or is he 3     talking about brand?</p> <p>4     <b>A   He would, I assume, be referring perhaps to</b> 5     <b>Atrovent. But, again, what he says and what was, you</b> 6     <b>know, ultimately done isn't necessarily the same thing.</b> 7     <b>He would have no responsibility for the branded product.</b> 8     <b>Again, because there was a constant sharing of</b> 9     <b>information, there could be suggestions from one to the</b> 10     <b>other but not necessarily acted upon.</b></p> <p>11     Q   Let me go on. It says (as read): This is in 12     keeping with our strategic imperative to be a leader in 13     respiratory products.</p> <p>14     Do you see that?</p> <p>15     <b>A   Yes, I do.</b></p> <p>16     Q   Did he make a misrepresentation when he said 17     that?</p> <p>18     <b>A   In which way?</b></p> <p>19     Q   Well, was -- did -- did Boehringer have a 20     strategic imperative to be a leader in respiratory 21     products?</p> <p>22     <b>A   I think we discussed that already. There was a</b> 23     <b>global strategy to be a world leader in respiratory</b> 24     <b>products. Roxane was one small cog within that strategy.</b></p> <p>25     Q   It goes on to say (as read): What I propose is a</p>	<p style="text-align: right;">76</p> <p>1     <b>operated on an open basis and many individuals make many</b> 2     <b>recommendations and suggestions. Mr. Tupa's</b> 3     <b>responsibility was for driving the Roxane business. If he</b> 4     <b>came up with an idea of perhaps that would help his side</b> 5     <b>of the business, he could state it. It doesn't</b> 6     <b>necessarily mean that it would be accepted and followed.</b></p> <p>7     Q   Well, let me ask this question: During your 8     entire tenure at the Boehringer Ingelheim U.S. operations, 9     was there ever a unified or combined marketing strategy 10     that encompassed the Roxane multisource ipratropium 11     product and the Boehringer branded Atrovent ipratropium 12     product?</p> <p>13     <b>A   No.</b></p> <p>14     Q   Never?</p> <p>15     <b>A   No.</b></p> <p>16     Q   You're sure about that?</p> <p>17     <b>A   I can't be 100 percent sure. In my recollection</b> 18     <b>I don't believe so.</b></p> <p>19     Q   Well, if there was a unified strategy to market 20     these two products together, the branded Atrovent and the 21     generic ipratropium bromide, who would be the senior 22     executive in the sales and marketing function responsible 23     for such a unified strategy in the U.S.?</p> <p>24     <b>A   I don't think we should speculate on that sort of</b> 25     <b>thing.</b></p>
<p style="text-align: right;">75</p> <p>1     rebate to wholesalers and central warehousing drug chains, 2     amount to be still being worked on, but one percent as a 3     target, to commit to all of our respiratory products.</p> <p>4     Do you see that?</p> <p>5     <b>A   Yes, I do.</b></p> <p>6     Q   (As read): This move would offset the advantages 7     Dey brings to the market. We have seen what the move of a 8     major wholesaler from our product on their, quote, source 9     program to Dey has done to sales. We must find a means to 10     bring this business back. I believe the bundle rebate 11     would have significant appeal.</p> <p>12     Do you see that?</p> <p>13     <b>A   Yes, I do.</b></p> <p>14     Q   So he's talking about bundling the Roxane 15     multisource with the Boehringer brand; correct?</p> <p>16     <b>A   I have no idea. He -- perhaps that may be one</b> 17     <b>interpretation, but I can't tell you that's what it refers</b> 18     <b>to specifically.</b></p> <p>19     Q   Well, is it your testimony that Mr. Tupa is not 20     recommending a unified marketing approach for the 21     Boehringer brand ipratropium bromide known as Atrovent and 22     the Roxane ipratropium multisource product?</p> <p>23     <b>A   I -- I can't attest to that. That may be one</b> 24     <b>interpretation. And, again, it doesn't mean that it was</b> 25     <b>necessarily followed. Again, people -- we opened -- we</b></p>	<p style="text-align: right;">77</p> <p>1     <b>(Exhibit No. 151, E-mail dated 11/22/95, was</b> 2     <b>marked for identification.)</b></p> <p>3     Q   Would you please look at what has been handed -- 4     what is the number on that one, 151, which purports to be 5     an e-mail with some attachment from Ed Tupa to David 6     Townley, Bates labeled ROX 04987, 988 and 989, dated 22 7     November 1995 at 6:02 p.m., and you are cc'd on it.</p> <p>8     <b>A   Okay.</b></p> <p>9     Q   And if you look at the -- I mean, this is talking 10     about sales and market projections for the unit dose vial 11     product of albuterol, correct -- or rather ipratropium 12     bromide?</p> <p>13     <b>A   Amongst other products.</b></p> <p>14     Q   All right. And if you go to the next page 15     there's a spreadsheet with some projections regarding 16     ipratropium; correct?</p> <p>17     <b>A   Yes.</b></p> <p>18     Q   And you see they've got the Roxane generic 19     projections on there right next to Boehringer Ingelheim 20     brand projections; do you see that?</p> <p>21     <b>A   Yes.</b></p> <p>22     Q   And if you go back to the first page, the third 23     paragraph down, it says (as read): In the U.S., Roxane 24     will be launching a generic of Atrovent. Underlying the 25     attached forecast is the assumption that Roxane will begin</p>

<p>78</p> <p>1 shipping product on May the 1st.</p> <p>2 Do you see that?</p> <p>3 <b>A Yes, I do.</b></p> <p>4 Q Then we go down to the next paragraph (as read):</p> <p>5 The total market for ipratropium UDV had not yet been</p> <p>6 fully developed due to the lack of adequate supplies of</p> <p>7 Atrovent UDV in the marketplace.</p> <p>8 Do you see that?</p> <p>9 <b>A Yes, I do.</b></p> <p>10 Q Why would Mr. Tupa be talking about Roxane's</p> <p>11 projected launch of a generic version of ipratropium</p> <p>12 bromide in the same e-mail with projections about Roxane's</p> <p>13 brand ipratropium bromide known as Atrovent?</p> <p>14 <b>A You mean, BIPI's brand --</b></p> <p>15 Q I'm sorry, BIPI.</p> <p>16 <b>A -- of Atrovent. Again, it follows along what</b></p> <p>17 <b>I've said previously. There's a sharing of information.</b></p> <p>18 <b>Mr. Tupa would have received the Atrovent forecast from</b></p> <p>19 <b>the appropriate people in the BIPI organization and would</b></p> <p>20 <b>comment on it but really from a generic perspective. But</b></p> <p>21 <b>he would not have developed the Atrovent brand forecast.</b></p> <p>22 Q All right. And this e-mail doesn't refresh your</p> <p>23 recollection or cause you to reconsider your -- your</p> <p>24 testimony before that there was never a combined marketing</p> <p>25 strategy for the brand and the generic ipratropium</p>	<p>80</p> <p>1 <b>A Correct.</b></p> <p>2 Q And -- and Ed Tupa was his counterpart on the</p> <p>3 Roxane multisource side; correct?</p> <p>4 <b>A Correct.</b></p> <p>5 Q And so you're -- they both reported to you?</p> <p>6 <b>A Again, Ed Tupa on a dotted-line relationship.</b></p> <p>7 Q Dotted line. And David Townley was with</p> <p>8 corporate headquarters over in Germany; correct?</p> <p>9 <b>A Yes.</b></p> <p>10 Q So he's writing to Ian and Ed and saying (as</p> <p>11 read): During recent PEP workshops --</p> <p>12 What's PEP workshops?</p> <p>13 <b>A Pep was a strategic initiative from the parent</b></p> <p>14 <b>company.</b></p> <p>15 Q (As read): There could be significant latent</p> <p>16 sales potential in the nebulizer solution and specifically</p> <p>17 the UDV market if we were to take the leadership in the</p> <p>18 following ways. Then it goes on. One, strongly force</p> <p>19 UDV's in markets were introduced. Two, launch UDV's in new</p> <p>20 markets particularly continental Europe. Three, defend</p> <p>21 against generic erosion of Atrovent from non-BI companies.</p> <p>22 Four, add non-BI substances to the range, ie, albuterol,</p> <p>23 cromoglycate, bud --</p> <p>24 <b>A Budesonide.</b></p> <p>25 Q -- budesonide. And then it goes on and says</p>
<p>79</p> <p>1 bromide?</p> <p>2 <b>A Absolutely not.</b></p> <p>3 Q Okay.</p> <p>4 MR. McCONNICO: These two exhibits, I just got an</p> <p>5 extra copy of the same one.</p> <p>6 MR. BREEN: I probably handed you two or --</p> <p>7 (Exhibit No. 152, E-mail dated 10/26/95, was</p> <p>8 marked for identification.)</p> <p>9 Q [By Mr. Breen] This is Bates labeled ROX 04860.</p> <p>10 It purports to be an e-mail from David Townley to Ian</p> <p>11 Mills and Ed Tupa copied to Shelly Berkle. Subject, UDV</p> <p>12 strategy USA, Thursday, October 26, 1995 at 7:06 p.m.</p> <p>13 MR. CRAWFORD: This has been marked Exhibit 152;</p> <p>14 is that right?</p> <p>15 MR. BREEN: Yes.</p> <p>16 <b>A Yes.</b></p> <p>17 Q [By Mr. Breen] Now, if you look at this, number</p> <p>18 one, who is Ian Mills?</p> <p>19 <b>A Ian Mills was my vice president of marketing and</b></p> <p>20 <b>sales at that point in time.</b></p> <p>21 Q For the business unit?</p> <p>22 <b>A Yes.</b></p> <p>23 Q And David Townley?</p> <p>24 <b>A I'm sorry. For the BIPI branded business.</b></p> <p>25 Q Oh, for the BIPI branded business?</p>	<p>81</p> <p>1 about half way down it says (as read): The USA currently</p> <p>2 accounts for some 50 percent of the world nebulizing</p> <p>3 solution market. I would greatly appreciate your input as</p> <p>4 we put the meat onto the bones on this strategy. Shelly</p> <p>5 and I have talked through this tonight, and he suggested</p> <p>6 that I approach you directly to request your assistance.</p> <p>7 What we need from you is a clear strategic outline of</p> <p>8 overall USA plans with specific references to points one,</p> <p>9 three and four above to also include sales forecasts for</p> <p>10 the PEP planning period, ie, 1996 through 2000. This</p> <p>11 should be from a total USA perspective, ie, BIPI and</p> <p>12 Roxane combined strategy. For example, how much</p> <p>13 ipratropium UDV business can Roxane take from BIPI and how</p> <p>14 do we shut out, in quotes, other nongenerics as far as</p> <p>15 possible. What is likely to be the change in price</p> <p>16 levels? Does offering a bundle of UDV substances assist</p> <p>17 and by how much? Who are our likely competitors, both</p> <p>18 current and new entrants and what is their likely</p> <p>19 response?</p> <p>20 Do you see that?</p> <p>21 <b>A Yes, I do.</b></p> <p>22 Q I'm going to ask you again, is it your testimony</p> <p>23 today that there was never a combined strategy at</p> <p>24 Boehringer Ingelheim U.S. that encompassed both the</p> <p>25 branded Atrovent and the equivalent generic ipratropium</p>

<p>82</p> <p>1 bromide manufactured by Roxane?</p> <p>2 MR. McCONNICO: Objection; form. Go ahead and</p> <p>3 answer.</p> <p>4 <b>A Correct. Again, this is a memo from an</b></p> <p>5 <b>individual, David Townley, who's at a lower level in</b></p> <p>6 <b>parent company, who has no directive or responsibility to</b></p> <p>7 <b>tell how to establish strategies. Again, I believe his</b></p> <p>8 <b>intent was and the reason he wrote to both Ed and to Ian</b></p> <p>9 <b>was recognizing that they each had to provide input from a</b></p> <p>10 <b>BIPI strategic point of view and from a Roxane strategic</b></p> <p>11 <b>point of view.</b></p> <p>12 Q [By Mr. Breen] So when he says that he spoke to</p> <p>13 you about this tonight, are you -- is it your testimony</p> <p>14 that he never talked to you about some combined strategy?</p> <p>15 <b>A I can't -- I can't recall that. Again, I only</b></p> <p>16 <b>interpret that as saying we -- you know, we talked and</b></p> <p>17 <b>Shelly said why don't you write each of the individuals.</b></p> <p>18 Q Okay.</p> <p>19 <b>A That's how I interpret it.</b></p> <p>20 MR. BREEN: We're about at the end of the tape</p> <p>21 again so why don't we take our tape break.</p> <p>22 THE VIDEOGRAPHER: This concludes Videotape No. 2</p> <p>23 of Sheldon Berkle. We're going off the record. The</p> <p>24 time is 11:12 a.m.</p> <p>25 (Short recess was taken.)</p>	<p>84</p> <p>1 business. The generic business was the generic business.</p> <p>2 The label for both products is different. There are</p> <p>3 regulatory issues involved. So even from a regulatory</p> <p>4 point of view, I don't think I'd even be able to do that.</p> <p>5 Q Well, I mean, I'm not suggesting that they would</p> <p>6 mislabel it or change the label. I'm saying just go ahead</p> <p>7 and sell it to some of your big customers for generic</p> <p>8 prices and let them go ahead and get reimbursed like it's</p> <p>9 a brand. They'll make some money -- we'll get rid of --</p> <p>10 extra money. We'll get rid of the excess inventory of the</p> <p>11 brand and everybody's happy?</p> <p>12 MR. McCONNICO: Objection; form.</p> <p>13 <b>A No. I mean, we had a branded strategy and we had</b></p> <p>14 <b>a generic strategy and we just wouldn't do that.</b></p> <p>15 Q [By Mr. Breen] And never -- they never met, did</p> <p>16 they, those two strategies?</p> <p>17 <b>A No.</b></p> <p>18 Q They were never combined?</p> <p>19 <b>A Not that I'm aware of.</b></p> <p>20 Q Well, let me show you what has been marked as</p> <p>21 Exhibit 111 in the deposition of Mr. King that was taken</p> <p>22 on December the 1st, 2004. It purports to be a Roxane</p> <p>23 Laboratories inter-office memo to Ed Tupa from Judy</p> <p>24 Waterer dated October 20th, 1996. (As read): Ipratropium</p> <p>25 bromide Back Order Management Plan.</p>
<p>83</p> <p>1 THE VIDEOGRAPHER: We're back on the record.</p> <p>2 This is for identification purposes. This is</p> <p>3 Videotape No. 3. The time is 11:22 a.m.</p> <p>4 Q [By Mr. Breen] When you were the -- in charge of</p> <p>5 sales and marketing for the business unit back in the</p> <p>6 1996, 1997 time frame, did there ever come a point in time</p> <p>7 where you became concerned about an excess inventory of</p> <p>8 Atrovent and concern that the company would incur a</p> <p>9 financial loss if the Atrovent were not sold in time</p> <p>10 before it reached and became -- was close to its</p> <p>11 expiration date?</p> <p>12 <b>A I certainly don't recall any specific time that I</b></p> <p>13 <b>would have had that concern. I think as a general</b></p> <p>14 <b>business rule I would always look at inventory numbers,</b></p> <p>15 <b>look at sales numbers, look at are we meeting a marketing</b></p> <p>16 <b>expectations or budget expectations. But, again, it was a</b></p> <p>17 <b>general business overview as opposed to being excessively</b></p> <p>18 <b>worried about one point or another.</b></p> <p>19 Q If you -- if you had an excess supply of</p> <p>20 Atrovent, would you turn it over to the generic division</p> <p>21 and say just go ahead and sell it at your generic prices</p> <p>22 so we can get rid of it?</p> <p>23 <b>A No.</b></p> <p>24 Q Why not?</p> <p>25 <b>A Again, the ethical business was the ethical</b></p>	<p>85</p> <p>1 And then in the second paragraph it says (as</p> <p>2 read): On Friday -- Friday I met with Mike Spitali and</p> <p>3 Jim King to discuss the possibility of about substituting</p> <p>4 the brand Atrovent for the generic. Mike gave me the</p> <p>5 following information.</p> <p>6 And it goes on in the next paragraph (as read):</p> <p>7 Mike would like to move this product through Roxane as it</p> <p>8 is very near its dating cut-off. He has no way to move it</p> <p>9 without drastically impacting his brand sales price for</p> <p>10 many months to come.</p> <p>11 Then it goes on in the next page, second</p> <p>12 paragraph (as read): I plan to take the discounted</p> <p>13 product to select customers that will be the least likely</p> <p>14 to divert it. The customers that have been identified as</p> <p>15 likely targets for Atrovent substitution of generic IB-UDV</p> <p>16 are direct warehousing retail chains, Accu-care (sic) and</p> <p>17 RDI. Apria, MP Total Care and Health Scripts will also be</p> <p>18 candidates for this substitution one they -- once they</p> <p>19 sign the 14 percent loyalty bonus program contract as it</p> <p>20 has a very specific definitions and penalties regarding</p> <p>21 diversion.</p> <p>22 Next to the last paragraph on that page (as</p> <p>23 read): I'd like to have BI hold the inventory until we</p> <p>24 sell it.</p> <p>25 The next page at the top (as read): I would like</p>

<p style="text-align: right;">106</p> <p>1       Answer: I don't know that.</p> <p>2       Is that -- is it that you do not recall or you</p> <p>3       don't know whether or not any other approvals were needed?</p> <p>4       Answer: I don't know beyond -- I don't -- I</p> <p>5       don't know if Mr. Berkle needed approval higher up, so I</p> <p>6       just don't know that. Now --</p> <p>7       MR. CRAWFORD: Why don't you state the ending</p> <p>8       page number.</p> <p>9       MR. BREEN: Yes. I ended at page 38 and line 13.</p> <p>10      Q [By Mr. Breen] Now, are you aware of any reason</p> <p>11     why Mr. Tupa would have been confused or mistaken in his</p> <p>12     testimony that you would have given final approval for the</p> <p>13     ipratropium bromide marketing plan?</p> <p>14      MR. McCONNICO: Objection; form.</p> <p>15      A I would like you to repeat. There was a line</p> <p>16     that referenced me in that and if I -- if you don't mind</p> <p>17     could you repeat that line?</p> <p>18      Q [By Mr. Breen] Okay. Well, the first time</p> <p>19     you're referenced is at -- at least in the section I wrote</p> <p>20     -- read is page 37 at line 16. And the question begins on</p> <p>21     13. (As read): And who would that be that would have to</p> <p>22     give approval?</p> <p>23      Answer: Well, the president of the company would</p> <p>24     be involved and I -- I believe that Mr. Berkle had been</p> <p>25     involved as well.</p>	<p style="text-align: right;">108</p> <p>1       Q Who was the -- who succeeded him?</p> <p>2       A Mr. Russillo.</p> <p>3       Q Russillo succeeded Wojta and he was in turn</p> <p>4       succeeded by whom?</p> <p>5       A That I don't know. Mr. Russillo, as I understand</p> <p>6       it, just retired at the end of 2004.</p> <p>7       Q Okay.</p> <p>8       MR. BREEN: Now, any more questions on that?</p> <p>9       MS. O'KEEFFE: I guess not.</p> <p>10      Q [By Mr. Breen] Any idea why, though, the</p> <p>11     ipratropium bromide for the generic Roxane discusses the</p> <p>12     Boehringer Ingelheim Atrovent product?</p> <p>13      A Again, I think it's a natural. You know, whether</p> <p>14     it's Roxane or a third party, Atrovent was the originator</p> <p>15     within that marketplace. They built that market. And I</p> <p>16     think from a competitive point of view, because that's how</p> <p>17     you have to view it, you have to know what the brand did</p> <p>18     in terms of establishing that market and where they are</p> <p>19     and, you know, how do you then capture that market share</p> <p>20     as a generic drug.</p> <p>21      Q So was the Roxane ipratropium bromide competing</p> <p>22     with the Boehringer Atrovent brand?</p> <p>23      A Absolutely.</p> <p>24      Q Now, did there ever come a time where you</p> <p>25     authorized or directed any of the Boehringer Ingelheim</p>
<p style="text-align: right;">107</p> <p>1       And then he's asked at line 21 (as read): And</p> <p>2       who is Mr. Berkle?</p> <p>3       Answer: He was head of the pharmaceutical</p> <p>4       business -- for human pharmaceuticals business for</p> <p>5       Boehringer companies in the United States.</p> <p>6       And then at page 38, line 5 (as read): Other</p> <p>7       than Mr. Wojta and Mr. Berkle, was there anyone else who</p> <p>8       would have had to approve the marketing plan for</p> <p>9       ipratropium bromide?</p> <p>10      Answer: I -- I don't know that.</p> <p>11      And then you're mentioned again.</p> <p>12      A That's fine. Thank you. Again, going back to</p> <p>13     that reference, Mr. Tupa himself he said "I believe," and</p> <p>14     I think that's very telling in the sense that I would be</p> <p>15     involved in the general strategy, but I would not have had</p> <p>16     access necessarily to the detailed marketing plan. I was</p> <p>17     concerned with the overall forecasts and general</p> <p>18     strategies, but not in the nitty-gritty of the marketing</p> <p>19     plan. Mr. Wojta really had the responsibility and the</p> <p>20     authority to approve that.</p> <p>21      Q And he was the president of Roxane Laboratories</p> <p>22     at the time?</p> <p>23      A Correct.</p> <p>24      Q Before Mr. --</p> <p>25      A Russillo.</p>	<p style="text-align: right;">109</p> <p>1       employees to go and meet with the senior management of a</p> <p>2       competitor Dey Laboratories for the purposes of talking</p> <p>3       about respiratory drugs that both companies were</p> <p>4       competing?</p> <p>5       A Are you referring to the branded, you know, BIPI</p> <p>6       or are you referring to Roxane?</p> <p>7       Q Either one.</p> <p>8       A Directed --</p> <p>9       Q Or authorized.</p> <p>10      A I am -- if I recall correctly, I'm aware that</p> <p>11     there were discussions, I think, on a business development</p> <p>12     perspective -- from a business development perspective in</p> <p>13     terms of for potential acquisition, potential product</p> <p>14     acquisition, that sort of thing. But as far as I know</p> <p>15     nothing went forward.</p> <p>16      Q Well, why would Boehringer be talking with Dey</p> <p>17     Laboratories about generic ipratropium bromide?</p> <p>18      A I don't know that they were talking about generic</p> <p>19     ipratropium bromide.</p> <p>20      Q Do you recall contemplating a potential market</p> <p>21     alliance between Dey and Roxane?</p> <p>22      A No, I don't.</p> <p>23      Q All right. Let's have this marked.</p> <p>24      (Exhibit No. 154, Inter-Office Memorandum dated</p> <p>25     5/21/96, was marked for identification.)</p>

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<p>1 retirement?</p> <p>2     A I think there was some discussion as to his</p> <p>3 quality of work. And there was a mutual understanding</p> <p>4 that he would leave the -- the organization.</p> <p>5     Q Who would have been the person with BI who would</p> <p>6 have had the primary responsibility to come to the</p> <p>7 decision that it would be a good idea for him to go</p> <p>8 elsewhere?</p> <p>9     A Certainly it would be a joint discussion with the</p> <p>10 -- Mr. Wojta, with myself, with Mr. Gerstenberg and with</p> <p>11 the representative HR senior executives in both</p> <p>12 organizations.</p> <p>13     Q Was he given any type of a severance package or</p> <p>14 early retirement that you recall --</p> <p>15     A My understanding again --</p> <p>16     Q -- Mr. Tupa?</p> <p>17     A Thank you. Again, this would have come out of</p> <p>18 the Roxane; but my understanding there was as part of the</p> <p>19 mutual understanding, a severance package involved.</p> <p>20     Q Do you know whether or not any of the reasons</p> <p>21 having to do with his being asked to leave had to do with</p> <p>22 the allegations in this lawsuit?</p> <p>23     A Not that I'm aware of.</p> <p>24     Q Can you give me any specifics about the quality</p> <p>25 of his work that would have resulted in the decision to</p>	<p>1 Q And her first name is Judy?</p> <p>2     A Yes.</p> <p>3     Q How long has she been the HR person for Roxane?</p> <p>4     A A number of years. Certainly since I -- I was in</p> <p>5 the United States.</p> <p>6     Q Which was in '94?</p> <p>7     A Certainly from that point, yeah.</p> <p>8     Q Is her name Judy Orinski?</p> <p>9     A Yes.</p> <p>10     Q O-r-i-n-s-k-i?</p> <p>11     A I believe so.</p> <p>12     Q And she would be the HR person who would be at</p> <p>13 the pinnacle of human relations for all Roxane employees?</p> <p>14     A Correct.</p> <p>15     Q An employee such as Dawn Gordon, and I hope I'm</p> <p>16 not misstating anything, it's my understanding that Dawn</p> <p>17 Gordon at least some point in time had responsibilities</p> <p>18 for selling Roxane products and also BIPi products and</p> <p>19 perhaps other products. Is that your understanding also?</p> <p>20     A For those two entities, yes.</p> <p>21     Q Okay. Where would her --</p> <p>22     A To the trade. You know, just to specify to the</p> <p>23 distribution trade.</p> <p>24     Q Okay. And if -- and if Dawn Gordon worked then</p> <p>25 for both of these corporate entities, who would her HR</p>
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<p>1 ask him to leave?</p> <p>2     A Off the top of my head I can't recall specific</p> <p>3 situations. I think it was just a general quality issue.</p> <p>4     Q How long had he been with the BI companies?</p> <p>5     A Again, I can't remember precisely what his -- you</p> <p>6 know, when he did leave the organization, but it had to be</p> <p>7 in the range of, what, six years, something like that.</p> <p>8     Q At one time he was Judy Waterer's boss, is that</p> <p>9 right?</p> <p>10     A Correct.</p> <p>11     Q Do you know if Judy Waterer or anything that she</p> <p>12 did or didn't do played a part in criticism of Mr. Tupa?</p> <p>13     A Not that I'm aware of.</p> <p>14     Q Who would be the individual who would have the</p> <p>15 clearest understanding about all of the reasons why</p> <p>16 Mr. Tupa was asked to consider going elsewhere?</p> <p>17     A Probably the head of HR within Roxane</p> <p>18 Laboratories.</p> <p>19     Q And who is that person?</p> <p>20     A That would be Judy. Can I consult with my -- I</p> <p>21 can't remember her last name.</p> <p>22     Q Is she in the Ridgefield office?</p> <p>23     A No. She's in the Columbus office.</p> <p>24     Q Columbus?</p> <p>25     A Yes.</p>	<p>1 person be?</p> <p>2     A Well, she reported in to Mr. Feldman which is</p> <p>3 part of the BIPi organization.</p> <p>4     Q So her HR people would be the BIPi HR people?</p> <p>5     A Correct.</p> <p>6     Q And who is the head of the HR for BIPi?</p> <p>7     A It's -- I believe it's still Mr. David</p> <p>8 Nurnberger.</p> <p>9     Q D-a-v-i-d and spell the last word for me, please,</p> <p>10 so I don't embarrass myself.</p> <p>11     A N-u-r-n-b-e-r-g-e-r.</p> <p>12     Q And is he in the Ridgefield, Connecticut office?</p> <p>13     A Yes, he is.</p> <p>14     Q Has he been there for a number of years?</p> <p>15     A Yes, he is -- has.</p> <p>16     Q Can you tell me off the top of your head the</p> <p>17 names of two or three other sales persons that you would</p> <p>18 consider to be contemporaries or cohorts of Dawn Gordon?</p> <p>19     A Not off the top.</p> <p>20     Q Can you tell me the name of any other salesperson</p> <p>21 that worked either for BIPi and/or Roxane that you believe</p> <p>22 would be a contemporary or cohort of Dawn Gordon? Can you</p> <p>23 name even one?</p> <p>24     A The primary person is Mr. Rich Feldman.</p> <p>25     Q Now, Mr. Rich Feldman is also -- we talked to him</p>